

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

BRUSH ELECTRIC COMPANY,

Plaintiff in Error,

vs.

CALIFORNIA ELECTRIC LIGHT COMPANY,
SAN JOSE LIGHT AND POWER COMPANY, AND
THE ELECTRIC IMPROVEMENT COMPANY OF SAN
JOSE,

Defendants.

Brief of Appellant, Brush Electric Company.

EDWARD P. COLE,

Solicitor for Appellant.

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Brief of Appellant, Brush Electric Company.

This is an appeal from the decree of the Circuit Court refusing to dismiss the appellant from the Bill in Equity brought without its consent by the California Electric Light Company and the San Jose Light and Power Company against the Electric Improvement Company of San Jose.

The facts as disclosed by the record are :

The Bill in Equity was filed on the 20th day of January, 1891, in the Circuit Court below, wherein the Brush Electric Company, the California Electric Light Company, and the San Jose Light and Power Company were named as parties complainant against the Electric Improvement Company of San Jose as defendant, for an injunction and incidental damages for infringement of a certain patent, the property of the Brush Electric Company.

Immediately thereafter, on February 14, 1891, the Brush Electric Company appeared specially and moved to be dismissed from the suit, because it had never authorized the action or the use of its name therein. (Transcript, pp. 61, 62.)

The motion was denied January 18, 1892, and the learned Judge decreed that the Brush Electric Company should allow

the use of its name and should remain as an unwilling plaintiff, but should have no control over the litigation, and should not be represented by counsel of its own choice.

Fully to appreciate this anomalous condition of affairs, a brief summary of the most important items in the Record will be suggested.

The bill says (p. 1), that before May, 15, 1879, one Charles F. Brush was the inventor of certain improvements in Electric Arc Lamps ; that September 2, 1879, letters patent No. 219,208 were issued to him thereon by the United States (p. 2) ; that on September 1st, 1880, the said Brush granted to the Brush Electric Company the exclusive *license* to make, use and *sell* the said inventions claimed in said patent throughout the United States ; subsequently, on January 8th, 1887, Brush assigned all his rights under and to said patent to the Brush Electric Company, and this assignment was duly recorded in the Patent Office.

That prior to the filing of this bill, the Brush Electric Company granted to the California Electric Light Company an *exclusive license to use, rent and sell and vend* to others for use and sale the said inventions described in said letters patent No. 219,208, throughout the States of California, Oregon, Washington and Nevada (page 2).

On March 27, 1882, the California Electric Light Company granted to the San Jose Brush Electric Light Company an exclusive license *to use, rent and sell, and to vend to others* the same inventions under letters patent No. 219,208 for the City of San Jose and the town of Santa Clara, State of California.

On June 29th, 1889, the San Jose Brush Electric Company granted to the San Jose Light and Power Company, one of the co-plaintiffs in this suit, this very same license granted by the California Electric Light Company, and for the same city and town (page 3).

It will hence be noted that by mesne conveyances the San Jose Light and Power Company became the exclusive licensee to use, rent and sell and to vend to others of the said inventions under letters patent No. 219,208 for the City of San Jose and the town of Santa Clara, and it will also be apparent (page 4) that the Brush Electric Company (the Cleveland, Ohio, Company) never consented to the grant of its license by the California Electric Light Company to the San Jose Electric Light Com-

pany, nor to the grant of the latter to the co-plaintiff, the San Jose Light and Power Company.

The bill further states that the Brush Electric Company is now the sole and exclusive owner of said letters patent No. 219,208 (*i. e.*, since January 8th, 1887), and that the California Electric Light Company, one of the co-plaintiffs, is the exclusive licensee, to use, rent, and sell, and to vend to others, of the inventions under said patent on this Coast; and that the San Jose Light and Power Company is now the exclusive licensee to use rent, and sell, and to vend to others the same inventions in San Jose and Santa Clara (*i. e.*, since June 29th, 1889) (page 4).

At side page 5, it is also stated that the San Jose Light and Power Company has introduced into use in San Jose and Santa Clara a large number of arc electric lamps embodying said patented inventions, and that the Brush Company has invested and expended large sums of money in the manufacture and sale of arc electric lamps under its patent, and that the Brush Company has largely introduced these lamps in use, and has made a large demand for them, and has provided facilities for promptly filling orders for said lamps.

Then follows an enumeration of various injunctions and decrees obtained by the Brush Company in favor of its letters patent No. 219,208.

At side page 14, the bill further states that since September 2nd, 1879, the date of the patent, the defendant, the Electric Improvement Company of San Jose, has willfully infringed this patent in the said City of San Jose and town of Santa Clara, without leave or license, and is still infringing, and that it has been notified to desist.

The prayer of the complaint is for an accounting of the profits made by defendant, and for both a provisional and perpetual injunction. And the bill is signed by Messrs. Estee and Wilson, solicitors for complainants.

Immediately on the filing of this bill the Brush Electric Company, one of the co-plaintiffs, moved to have its name stricken from the bill, and that it be dismissed from the suit, on the ground that it had never authorized nor consented to the use of its name therein, nor the bringing of the action.

This motion was resisted, not by the San Jose Light and Power Company, one of our co-plaintiffs, and the only one that

could be injured by the dismissal, but by the California Electric Light Company, the other co-plaintiff. (Transcript, p. 62.)

The learned solicitors never claimed, nor attempted to claim, that they ever had either general or special authority immediate from the Brush Electric Company to bring the suit, but that their right came from the California Electric Light Company, whose solicitors they were, and whom alone they represented, by virtue of some irrevocable power vested in the California Electric Light Company to use the name of the Brush Company.

On this motion the respective parties, to wit, the California Electric Light Company and the Brush Electric Company, filed many affidavits, all of which are in the Record.

By an examination of the affidavits of the California Electric Light Company, we find the grounds on which the motion to dismiss is resisted.

The affidavit of Mr. Roe, the Secretary and Manager of the Company, *inter alia*, says (page 62), that on October 18th, 1875, there was incorporated in Ohio the Telegraph Supply Company, to manufacture telegraph supplies; that on the 10th day of August, 1876, one William Kerr purchased of this Company the right to manufacture, use and sell certain inventions described under letters patent No. 154,924 for this coast.

And on the same day he also purchased of the same Company the right to use certain devices described in letters patent 130,941, dated August 27, 1872, and the re-issue No. 6,579, dated August 3, 1875, for the same territory (page 63).

And also, on the same day, Mr. Kerr purchased still another right of this Company for this Coast, to wit, the right to sell, use and manufacture the devices under letters patent No. 139,826, dated June 10, 1873, and the re-issue, No. 6,581, dated August 3, 1875 (page 63).

Not one of these three patents have any relation to the suit at bar, nor has any one of them ever been transferred to any person connected with this suit, and certainly not to the California Electric Light Company. These patents were for telegraph supplies. (Exhibit A of Affidavit, page 72.) Second, for electric signaling apparatus for R. R. (Exhibit B of Affidavit, page 73). And the third was for improvement in electric annunciators. (Exhibit C of Affidavit, page 75.)

After the narrative of this irrelevant stuff, the affiant continues (page 63), that in 1877 Mr. Brush perfected his electric light apparatus, which is covered by the patent sued on, viz., No. 219,208, and thereupon granted his rights to the Telegraph Supply Company for the United States, and after the issuance of the patent he assigned and conveyed all his interest in the patent to the Brush Electric Company, the Telegraph Supply Company having in the meanwhile adopted that name.

This voluminous affidavit also pretends to interpret the meaning of these assignments. Not confining himself to facts, affiant usurps the office of the Judge and swears that his opinion of the legal effect thereof is correct.

Exhibit E of the affidavit (page 76), is claimed to have relation to the suit, but his throng of words cannot thrust this Court from a level consideration, and the letter speaks for itself.

This letter is dated February 2, 1878, and the language is as follows :

“ We understand our contract made with Mr. Kerr, made August 10, 1876, to embrace not only the use of all patents specifically described therein in the territory specified, but also any and all patents of which we may become possessed after the date of said contract, for improvements on any of the devices named in any of said patents, or for any inventions of the same general character.”

Your Honors, in this connection, will recall that the patent sued on and involved in this litigation was not issued until September 2nd, 1879.

The affidavit (side page 74), continuing, says that on June 30, 1879, the California Electric Light Company was incorporated in this State, for the sole purpose of engaging in electric lighting ; and that it became the purchaser from Kerr of all the interest acquired by Kerr on the aforesaid patents, also all the Brush dynamo electric machines, lamps, etc.; but as some of these agreements between Kerr and the Brush Company were informal, on August 2, 1879, the Brush Company made a new agreement about these patents, Nos. 139,827 and 154,924, and on August 21, 1879, that Kerr conveyed all his rights under these patents, and the one in suit, to the California Electric Light Company, and that the Telegraph Supply Company, the predecessor of the Brush Company, ratified this, and to prove this he refers to Exhibits F, G and H (side page 74).

On turning to Exhibit G (side page 100), we find that affiant is not truthful, for we see that Kerr has sold to the California Electric Light Company only his rights under the agreement of August 2, 1879, known as Exhibit F, and he nowhere conveys his rights under any of the patents or agreements other than the one in suit, and this refers exclusively to the arc lamp patent and dynamos.

And on looking to Exhibit F (page 77), which is referred to in the assignment of Kerr to the California Electric Light Company, we discover that this contract made by Kerr and the Telegraph Supply Company was just one month before the date of the Brush patent, to wit, September 2nd, 1879, and seven (7) years and four months before this patent was conveyed by the inventor, Charles Brush, to the Brush Electric Company, and seven years and four months before the Telegraph Supply Company, or its successor, had any power or right to grant a license of any kind on this patent, to any person or for any territory.

(The bill, page 2, states that this patent was conveyed by Brush to the Brush Company, January 8th, 1887.)

This Exhibit F is the only authority possessed by the California Electric Light Company to act as the licensee or agent of the Brush Electric Company, and is the foundation on which rests the claim of the California Electric Light Company to use our name and maintain this suit in our name against our will. And as frequent allusions must be made to this important document, we beg your Honors to arrest your attention and to re-read its language.

The affiant Roe, resuming, further says (side page 76), that in October, 1879, the California Electric Light Company erected in San Francisco a large and expensive structure, known as a central station, and began the distribution of light in that city, and that it was the first in the world, and owing to the success of its station it has invested there \$892,531.31 in electric lighting, under the patents of the Brush Company, and for material and apparatus the California Company has paid the Brush Company \$683,741.00.

That the California Company has pushed the business everywhere on this Coast, and has bought of the Brush Company an electric plant having a capacity of 5,778 arc and 7,716 incandescent lamps, and is still buying; that it has salesmen at large sal-

aries traveling over the Coast in luxury and ease, and is surrounded with all the panoply of wealth and dignity; that January 22, 1891, it gave an order to the Brush Company for \$1,730 worth of goods, and has also *caused to be invested* large sums of money in Brush Electric Apparatus in the cities of San Jose, Sacramento, Santa Cruz, and other cities in this State, and in Oregon and elsewhere, and has also sold a large amount to private parties.

That in San Jose (side page 77), there has been invested, through the influence of the California Electric Light Company, over \$100,000.00 in an electric lighting plant.

That after this investment the Electric Improvement Company of San Jose, the defendant in this action, erected a rival plant and secured a city contract for lighting streets for \$72,000.00, and is using the Wood lamp therein, which is an infringement on the Brush lamp; that this infringement seriously jeopardized the interest and business of the San Jose Light and Power Company, which is acting under the organization of the California Electric Light Company.

In July, 1880, the name of the Telegraph Supply Company was changed to the Brush Electric Company.

At page 67 affiant states, the Thomson-Houston and the Brush Electric Companies are the leading ones, and are rivals, and that the former is pushing its business on this Coast as an active competitor of the California Electric Light Company, the licensee of the Brush; that in January, 1891, the Thomson-Houston absorbed the Brush Company, which is now under the control of the former, as is also the Fort Wayne Electric Company, the parent of the defendant the Electric Improvement Company of San Jose, which is also a competitor of the California Electric Light Company; that the Wood lamp is nominally the property of the Fort Wayne and really that of the Thomson-Houston Company, which is fast absorbing all other companies so as to become a great monopoly.

That on July 3, 1890 (p. 69), the Brush Electric Company consented to allow the use of its name in another suit involving the Wood lamp, brought by the California Electric Light Company against another corporation, and that it sent out from Ohio its own lawyers to fight the case, who were generously paid by the California Company; that a preliminary injunction was issued

in that case, and that the Fort Wayne Company also gave the other Company the right to use the Wood lamp, and that the defendant and the other Company enjoined are virtually one.

That the California Electric Light Company is one of the real parties in interest in this action.

That there has always been an understanding and agreement between the Brush Electric and the California Electric Light Company that all infringers on this Coast should be actively prosecuted, and that they should join in the actions, and this agreement was carried out by the Brush Company until January, 1891.

To the numerous letters appended to his affidavit, affiant, as usual, attempts to give a false interpretation, and notably so as to his Exhibit No. 15, dated June 23, 1890.

This is the only material affidavit of facts on the part of the California Electric Light Company, and on it its claim to the use of our name in this suit rests.

The affidavits on the part of the Brush Electric Company contradict every statement of Roe, and the very Exhibits appended to his affidavit show the disingenuousness of his story.

It will be noticed at once that Roe is silent about any injury to the San Jose Light and Power Company, the only plaintiff in the case which has the territory of San Jose and Santa Clara in which to operate, if the allegations in the bill and Roe's affidavit be true.

It will also be apparent, on even the slightest examination, that the San Jose Light and Power Company neither resists our motion to be dismissed, nor files any affidavits, nor shows any right to hold us in the suit.

The affidavit of Roe also shows, 1st, that the California Electric Light Company has not and can not be injured in San Jose and Santa Clara by any act of the defendant or of ours.

2d. The California Electric Light Company has no interest in the territory of San Jose and Santa Clara, as it has parted with it, nor has it ever invested one dollar in either place; and San Jose and Santa Clara are the only places where the defendant is alleged to be infringing.

These facts appear from the bill and the affidavits of the California Electric Light Company, and on its own showing it has no right to use our name against our wish.

On the part of the Brush Electric Company various affidavits, by its Directors, Manager, Treasurer and Attorney, were read to support its motion.

The affidavit of Mr. Potter is a direct and unqualified denial of the construction put on the various contracts by Roe's affidavit, and clearly shows that the Brush Company has never, either expressly or impliedly, authorized or consented to the use of its name in this suit.

Mr. Potter says (page 115): That the Brush Electric and the Thomson-Houston Companies are not consolidated, but exist under separate and distinct managements.

That Exhibits A, B, C of Roe's affidavit are falsely construed by Roe, as is apparent on their perusal.

That the limit of the power of the Telegraph Supply Company was the manufacture of telegraph supplies, etc., and at the time of these agreements Brush had not invented his electric lighting (page 115).

That the contract of August 2, 1879, was a new and independent contract and for a different purpose and to cover a different subject.

This contract was the only one ever assigned and transferred by Kerr to the California Electric Light Company, although Roe has devoted pages of his affidavit to the interpretation of what did not interest him. This useless matter injected in his throng of words was intended to confuse and to lead the judicial mind from the contemplation of the only rights this Company has, viz., those contained within the limits of Exhibit F.

This meaning which Mr. Potter gives to this contract varies *toto cælo* from the self-serving views of Mr. Roe, who was not a party to it.

The affiant says :

1st. That the contract only permitted Kerr to use and sell the apparatus of the Brush Company.

2nd. That no assignment of this contract could be made without the consent of the Brush Electric Company, and then only as an entirety.

3rd. That the Brush Company has never assented to the assignment of the California Electric Light Company to the San Jose Light and Power Company.

That the Brush Company has never consented to the use of its name in this suit.

That the Fort Wayne is not controlled by the Thomson-Houston Company. The affidavits of Stockly and Leggett are to the same effect.

After the presentation of these affidavits and argument of the motion, the learned Judge denied us the right of withholding our name from this litigation, and is compelling us to continue to prosecute and persecute the defendant against our will.

From this order and decree the Brush Electric Company brings this appeal.

ASSIGNMENT OF ERRORS.

1st. The Court had no jurisdiction of the Brush Company to compel it to be a co-plaintiff for any purpose.

2nd. That, against its will and without process, no one can make the Brush Company a co-plaintiff.

3rd. That no process was ever served on the Brush Company, and no one was authorized to appear for it.

4th. That the license to the California Electric Light Company contains neither an express nor implied covenant for the protection of the license from infringement; nor for the use of the name of the licensor by the licensee to sue infringers.

5th. That the license to the California Electric Light Company was unassignable save as an entirety, and not even then without the express consent of the licensor.

6th. That the transfer of this license by the California Electric Light Company by mesne conveyance to the San Jose Company was against the consent of the Brush Company and to its injury.

7th. That the California Electric Light Company has no interest in this suit, having assigned all its rights to the San Jose Company, which alone can be injured.

8th. That this suit is exclusively for the benefit of the San Jose Light and Power Company, with which we have no privity and which is itself an infringer.

9th. That the California Electric Light Company has no interest in the suit, and is not and cannot be injured by any act of the defendant.

10th. That the California Electric Light Company is not even a licensee of the Brush Electric Company.

11th. That there is no contractual relation between the Brush

Electric Company and the San Jose Light and Power Company, and hence no covenant can be even implied giving it authority to use the name of the Brush Company.

The above is only an abstract of the assignment of errors which will be found at length in the Record, from page 162 to 169.

ARGUMENT.

To enable the appellees, the California Electric Light and the Light and Power Company, to sustain their position, and to have the order of the lower Court affirmed, this Court must decide :

1st. That jurisdiction over the person is not required to adjudicate his rights.

2nd. That Exhibit F is a license.

3rd. That this license is assignable in part, and is not personal to the licensee.

4th. That the assignment by the California Electric Light Company to the Light and Power Company is valid, and that the Brush Company has no right to be heard on the question.

5th. That the California Electric Light Company can use our name to sue infringers even in territories over which it has no control.

6th. That the California Electric Light Company has suffered some injury, which entitles it to use our name to redress.

7th. That there is an express covenant in its license on the part of the Brush Electric Company to protect it against infringers.

8th. That in every license there is an absolute right implied to use the name of the patentee to sue infringers, and, to do so, that it can wantonly put in jeopardy the very life and validity of the patent itself, without even any right on the part of the patentee to protect himself by his own counsel or his own methods.

Your Honors will notice that nowhere in his affidavit does Mr. Roe state any facts showing that his Company has even invested one dollar in San Jose or Santa Clara, or that it has been or can be damaged by any act of the defendant.

And just here we call attention to the well known maxim of the law, viz.: That a wrong without damage can never give a cause of action.

And if the California Electric Light Company has not and can not suffer damage, it can not, even under the utmost extent of its claim, use our name to enforce a demand which does not exist.

That under such circumstances the use of our name to bring a suit without our consent, and which is both wanton and unjust, is too plain for argument, since the only result of the litigation must be to impeach and imperil our patent ; for judgment must go for the defendant.

If, on the other hand, the suit can be maintained by the Light and Power Company, it must be because it is damaged, and has rights which we are compelled to protect.

The bill says that the only parties that are or can be damaged are :

1st. The Brush Electric Company, whose monopoly is infringed.

2d. The Light and Power Company, whose profits have been decreased.

But before the Light and Power Company can be damaged it must have had some rights to be disturbed. The only source of its rights is the Brush Electric Company, and it says it never gave it any, nor authorized any to be given.

Now, in order to use our name in this unwarranted way, the Court must find that the transfer by the California Electric Light Company to the Light and Power Company of this license was approved or authorized by us. And it will then be practically adjudged that this assignment is valid. But on so vital an issue, it must be unquestioned and unquestionable that we have the right to be heard, and to be tried by the law of the land, a law which hears before it condemns, proceeds upon inquiry and renders judgment only after trial, or, as Justice Edwards, in *Westervelt vs. Gregg*, 12 N. Y., 209, puts it: "Due process of law undoubtedly means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights."

To render this constitutional guaranty effectual, we must have the right, if we be plaintiffs, to choose our own forum, our own solicitors, and to press our cause our own way; in short, we must in all respects hold the independent position of *dominus litis*.

If we be defendants, then we must be brought before the tribunals in the regular and legal way, by the process of the Court duly served.

And if jurisdiction can not be obtained, then the Court must, as has often been the case with the tribunals of our country and of England, refuse to pass on the questions for the proper determination of which we are both a necessary and indispensable party.

“ Notice of some kind is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power.

“ It is of the essence of a cause ; without it, there can not be parties, and without parties there may be the form of a sentence, but no judgment.”

But suppose that the Court could assume, arbitrarily, jurisdiction over us, even then the contention of the appellees can not be maintained, for we must still have our day in Court.

The decision of the learned Circuit Judge was based wholly on the case of *Brush-Swan Electric Light Company vs. Thomson-Houston Electric Company* (48 Fed. R., 224), he laboring under the impression that the cases were similar, whereas, in fact, there is a wide difference between the case at bar and that in 48 Fed. R., 224.

There are some points of resemblance which encouraged this mistake, and they can be readily detected. The points of similarity are as follows:

It is conceded in both cases that the bill was brought by the solicitors without the knowledge of the Brush Electric Company, and that no express authority to use its name had been given in any contract or otherwise.

The claim in both cases was that a licensee had an absolute right to use the name of the licensor to protect it from infringement within its district.

The points of dissimilarity are these:

1st. The suit in the 48 Fed. R., 224, was brought by the licensee to protect its own interest. The licensee in New England had not parted with any of its rights over the district and territory wherein the infringement was perpetrated and for which it had a license.

2nd. The use of the name in the 48 Fed. R. was not a wanton exercise of an assumed power.

3rd. In that case the Brush Electric Company was before the Court in the person of the Thomson-Houston Company,

which had been served with process and given an opportunity to be heard, and the Court had jurisdiction, according to its opinion.

4th. In the case at bar the California Electric Light Company, if it be the licensee of the Brush Company for this Coast, has long since assigned and transferred all its rights to the San Jose Light and Power Company over the territory wherein the offense was committed by the defendant, and retains no interest or right in San Jose or Santa Clara.

5th. The California Electric Light Company wantonly assigned and transferred to the San Jose Light and Power Company, without consent or permission, all the privileges and licenses conferred on it, and against the very express language of its contract with the Brush Electric Company; and when the Brush Company asked about this transfer of an unassignable license, it was informed it was none of its business, and now the California Electric Light Company wrongfully joins our name with its own assignee in this bill, and thus tries to compel us to consent to and ratify an unauthorized act, under peril of a litigation about the title to our patent. The position in which we are placed by this use of our name is this:

By suing the defendant for an infringement done in San Jose we must concede that the California Electric Light Company can assign its license at any time, or in any manner, and in whole or in part, without our consent, or that we have authorized this transfer to the Light and Power Company. For the existence of these facts which are sworn to, we, as a party to the bill, must confess, and yet we deny any such rights as are claimed by either of our co-plaintiffs; or we endanger the validity of our patent by the possibility of an adverse decision.

Surely, this is a wanton and outrageous use of our name and violation of our sacred and absolute rights, for without the service of process or any voluntary appearance on our part, or any chance to be heard, this California Electric Light Company seeks not only to have a decree of specific performance against us, and a judicial interpretation of this contract with us entered in its favor, and also that the benefits claimed by it be extended to its friend and neighbor, the Light and Power Company, and to all else who may elect to come within the scope of its good-natured generosity, but also it puts in peril our patent itself.

In the case in 48 Fed. R. there was no reason urged except the will and pleasure of the Brush Company why it should be dismissed from the bill, and there was no dispute about the assignability of the license, and besides the only point was : Could the Brush Company's name be used in that suit, and did the Court have jurisdiction to adjudge for or against it? The learned Judge even there said he had jurisdiction, because process had brought in the Thomson-Houston Company, its owner, but that to allow a licensee to throw its licensor into litigation as to its patent was too dangerous a right if uncontrolled. But what use is the patent right, if a licensee without authority can assign all the patent privileges for any part of the country it may choose? The patent is valueless if the licensee can use the patentee's name at will, even to redress wrongs done in a district over which the licensee confessedly has no authority or power.

The learned Judge, in 48 Fed. R., in conclusion, says : " If the licensee is to have the opportunity to assert his alleged rights, he is at a great disadvantage, unless he has the power of bringing a suit in equity in the name of the owner, even against his will. In my opinion he has *prima facie* such an implied power."

Judge Hawley, who decided the case at bar, assumed that all the facts were like those before Judge Shipman, and that the California Electric Light Company had alleged rights, and was seeking to assert them ; while in fact, it alleged it had parted with all its rights and was only trying to assert the alleged rights of its assignee, with whom we had no privity.

But in addition to the non-applicability of the case in 48 Fed. R., we are confident that the result of the opinion, viz., the refusal to let the Brush Company out of the litigation, is not law unless it can be based on the principle that the Court had jurisdiction of the Brush Company because it had caught its owner, the Thomson-Houston, by process.

The opinion of the learned Judge who denied this motion to dismiss is found in 49 Fed. R., 73, and Transcript, p. 146, and I again call attention to his manifest misunderstanding of the facts in this case.

In his opinion Judge Hawley nowhere alludes to the San Jose Light and Power Company, the real party in interest, who alone has or can be injured by the torts of defendant in San Jose and

Santa Clara, the only wrongs in the purview of the bill. Nor does he even notice the wrongful and inequitable assumption of power by the California Electric Light Company in assigning without consent its license to the said Light and Power Company.

Judge Hawley also says that it is a close question whether the Brush Company by its correspondence has not given a general power of attorney to the California Electric Light Company to use the name of the Brush Company in any suit whatever at will. Without fear of contradiction we can safely assert that nowhere in the Record can any evidence of this character be found, but, without deciding this point, he rests his whole decision on the ground that the California Electric Light Company had certainly an implied right to the use of the name of the Brush Company to defend and maintain *its rights*.

But what rights? It had none, for it had sold out to the Light and Power Company, which alone was interested in maintaining this suit.

The California Electric Light Company never had and never claimed to have any plant in either of the cities, or to have wasted any money there, the scene of the infringement, nor does it claim to own and control the Light and Power Company, the sole owner under its assignment, of the territory of San Jose and Santa Clara.

The only contract by which the California Electric Light Company claims any rights from the Brush Electric Company is the agreement of August 2, 1879. (Transcript, page 77.)

By this agreement the Telegraph Supply Company gives and grants to Kerr and his assigns the exclusive right on this coast to use and sell, but not to make, all inventions owned and controlled by it, or which *it may become possessed of*. Kerr agrees *inter alia* to push forward the introduction and sale thereof with all possible diligence, and to transact the business with promptness and fidelity.

The 6th subdivision thereof (page 78) is: "It is understood that the covenants herein contained shall extend to Kerr's assigns and legal representatives provided they are responsible parties, and are approved by the Telegraph Supply Company."

On August 21, 1879, Kerr assigned this contract to the California Electric Light Company (page 79).

To this assignment the Telegraph Supply Company assented (page 80).

This is the only instance in the entire Record of any consent to any assignment of this license on the part of either the Telegraph Supply or the Brush Electric Company, its successor.

At the time of this contract Brush had not transferred the title to his patents to the Brush Company, and did not until July 27, 1886. (Affidavit of Stockley, page 133, Ex. A.)

The affidavit of Potter (page 116), of Stockley (page 133), and of Leggett (page 123), all show that at the time of this contract of August 2, 1879, the Telegraph Supply Company was only itself a licensee of an unassignable license, and it had neither the power, nor was it intended, to convey to Kerr anything more than a mere agency to sell.

The affidavit of Potter accentuates two things, which are not disputed in the case:

1st. That no consent has ever been given to the assignment to the Light and Power Company, or to the commencement of the suit.

2nd. That the contract of August 2, 1879, distinctly contemplates only an assignment of this license of the California Electric Light Company in an entirety.

It will be also noticed as a conspicuous feature of this contract of August 2, 1879, that there is no covenant on the part of the Telegraph Supply Company to protect Kerr against infringers, nor does it give him the right even to sue in the name of the licensor.

The right to one's name is an absolute right, and if a suit be brought in one's name without authority, it will be dismissed.

1st Dan. Chan. Pr., Ch. 5, Ch. 6, p. 307.

Clark vs. Willet, 35 Cal., 538.

Turner vs. Caruthers, 17 Cal., 431.

Weeks on Attorneys, page 343.

And when the authority is denied, the burden is thrown on the party assuming that right to prove it.

1st Dan. Chan. Pr., Ch. 6, pp. 307 and 308.

There being no claim on the part of the respondents that any express authority to use our name by any one was ever given, then to maintain this action there must be one implied; and

this brings us to a consideration of the relative rights of a licensee and patentee.

The California Electric Light Company is only a licensee at most.

Waterman vs. Mackenzie, 138 U. S., 255.

Two actions are allowed by the law against infringers :

One at law for damages solely.

2nd. One in equity for an injunction to restrain the infringement and for incidental damages. Both are founded on tort *i. e.*, the wrongful act of the infringer.

In all actions at law for damages, the suit must be brought in the name of the patentee for the benefit of the licensee whose rights are invaded ; in equity, the licensee and patentee may join.

Birdsell vs. Shaliol, 112 U. S., 486.

Waterman vs. Mackenzie, 138 U. S., 255.

The language of the decision is :

“An action at law for the benefit of the licensee must be brought in the name of the patentee ; a suit in equity may be brought in the name of the patentee and licensee together.”

But why this circumlocution? The reason is plain: the Court must have the legal title before it can render any judgment which can protect the defendant in the action, and hence it must have jurisdiction to adjudge.

The only part to which the licensee is entitled are the damages.

In injunction suits, the owner of the legal title, and the person equitably entitled to damages, are the only parties immediately injured by the infringement.

Goodyear vs. R. R., 1 Fish., 622.

But it is suggested that there may be many licensees scattered over our vast domain, and it is important to know what licensee can be joined with the patentee in equity, and is entitled to the damages recovered in a suit in equity or at law.

Surely it cannot be contended with reason, that a licensee, whose territory has not been invaded, can be joined, or can be entitled to the damages recovered for wrongs committed in a district over which he had never obtained a license, or where he had long since transferred it.

Moore vs. Marsh, 7 Wal., 521, speaking of suits by grantees of territorial rights for a particular district, says he may sue in his own name for invasion of the patent in that territorial district, as *no one else is injured* by any such infringement.

The licensee of the State of Ohio cannot be joined with the owner of the patent to restrain an infringement in California, because the wrong is not in his territory, and he would not be equitably entitled to the damages recovered.

And if the owner of the patent holds the legal title to his patent in trust for his licensee, as is intimated in *Littlefield vs. Perry*, 21 Wal., 223, it must be for the licensee who is in privity by contract with him. He cannot be called a trustee for a tortfeasor and an usurper. .

The contract of August 2, 1879, between the Telegraph Supply Company and Kerr says (page 78), that the assigns of Kerr must be first approved by it before the assignment can be of avail or carry any rights to the assignee, and the California Electric Light Company became bound by this limitation when it obtained this contract from Kerr.

Walker on Patents, Sec. 310, page 239.

2 Robinson on Patents, Sec. 823.

The California Electric Light Company conceded the unassignability of this license by deeming it necessary to obtain the consent to its purchase from the Telegraph Supply Company.

In *District of Columbia vs. Gallagher*, 124 U. S., 505, the Court say: "When in the performance of a written contract both parties put a practical construction upon it, this construction will prevail over even the language of the contract."

But the language is too plain to need this decision; for, unless the Brush Electric Company reserved the right of approval as a condition precedent to the exercise of its licensee's right of assignment, this last clause of the contract, known as Exhibit "F," becomes meaningless, and, by the failure or refusal of the Brush Electric Light Company to approve of any assignment its licensee may elect to make, this licensee could assign to any one, however inefficient, irresponsible or inimical to the licensor, and thus destroy the very object and purpose which the patentee had in view when it granted this license. Nay, the assignee, because of this refusal, would be released from any obedience to any of

the covenants for the performance of which the licensee had solemnly pledged his good faith and word. But the law will tolerate no such violation of the clear intent and meaning of the parties.

The Civil Code of California says:

“ SEC. 1366. A contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful.

“ SEC. 1641. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

Again, Pollock on Contracts (page 435), says that—

“ Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.”

The cardinal rule in the construction of all contracts is that the intention of the parties must control, and the whole contract must be considered in arriving at that intention.

Chicago & Rock I. R. vs. Denver & R. G. R. R., 143 U. S., 596.

To give a fair and reasonable interpretation to this contract, it must be conceded, that, from its language and stipulations as well as the conduct of the parties, the intention of the parties was, that Kerr, the licensee of the Brush Electric Co., did not have and was not to have the right to assign his license, without first getting the approval of his licensor, the Brush Electric Co. That being so, what right of assignment has his assignee in the absence of this approval?

Oliver vs. Rumford Chemical Works, 109 U. S., 76, was an action at law for infringement of a patent.

The Rumford Chemical Works was the patentee, and it granted a license to Morgan for a large part of the State of Tennessee. Morgan died. His administratrix sued Oliver in the name of the Rumford Chemical Works, for infringement. The word assign was not in the grant of the license to Oliver. The Court, on pages 82 and 83, said:

“ Morgan was a mere licensee. This being so, the instrument of license is not one which will carry the right conferred to any

“ one but the licensee personally, unless there are express words
 “ to show an intent to extend the right to an executor, administra-
 “ tor or assignee, voluntary or involuntary. In the case of *Troy*
 “ *Iron & Nail Factory vs. Corning*, cited in the above case, the
 “ language is:

“ A mere license to a party, without having his assigns or
 “ equivalent words to them, showing that it was meant to be as-
 “ signable, is only a grant of a personal power to the licensee, and
 “ is not transferable by him to another.” And the language in
 109 U. S., page 83, is most appropriate, in view of the agree-
 ments entered into with Kerr, which equally bind the Cali-
 fornia Electric Light Co. It is as follows:

“ The right is granted to Morgan alone—to him personally—
 “ with an agreement by him that he will enter on the manufac-
 “ ture of the self-raising flour, and he will use all his business
 “ tact and skill to introduce and sell the flour. It is apparent,
 “ that licenses of this character must have been granted to such
 “ individuals as the grantor chose to select, because of their per-
 “ sonal ability or qualifications to make or furnish a market for
 “ the materials, all of which was to be purchased from the gran-
 “ tor.”

Tuttle vs. La Dow, 7 N. Y., Supplement, 277, was an action for
 specific performance of a contract of license, made between the
 defendants, The Wheeler & Melick Co. and defendant La Dow,
 with certain other parties who had assigned to plaintiff. There
 were no express words of assignability in the license. The Court
 said:

“ The rule seems to be, that in order to make a mere license as-
 “ signable, it must contain express words to that effect, and
 “ specific performance was refused.”

Suppose the Light and Power Co. had sued the Brush Co., to
 enforce specific performance, and the Brush Co. had appeared,
 could it have prevailed?

And just here, let us again call attention to one of the preg-
 nant facts of this case, viz., that no objection nor affidavit has
 been made by the San Jose Light and Power Co. against our
 right to be dismissed from this bill, nor has any claim been made
 by it that, because it is the assignee of the California Electric
 Light Co., it has any rights as against us, or that we ever ap-
 proved this assignment.

Now, even if this license of Kerr, which was assigned to the California Electric Light Company, were assignable, yet it is equally well settled that it can not be assigned except as an entirety.

Walker on Patents, Section 310, page 239.

Brooks vs. Byam, 2 Story, 545.

Consolidated Fruit Jar Co. vs. Whitney, 1 Bann. & Ard., 356.

13 Am. and Eng. Ency. of Law, page 570.

Since the California Electric Light Company had no right to assign its license, without our approval, to the San Jose Light and Power Company, or for a part only of this district, the latter is itself an infringer of our patent, and against it we ourselves have a cause of action; and for the violation of the contract with us we have also an action against the California Electric Light Company to cancel and rescind its license, and also for infringing our patent, because it has authorized an unlawful use thereof.

In view of these facts, can it be said that the Brush-Swan case, in 48 Fed. R., is applicable? Assuming that a Court of Equity sometimes can allow the use of the name of the patentee against his will, it will not, when such use is wanton and inequitable; it will not lend its aid to the violation of a contract, and to assist a wrongdoer. Its first principle is: He who comes into a Court of Equity must come with clean hands; it stops him *in limine*, who, in his prior conduct, has violated his good faith and his conscience, even though he himself has suffered wrong.

While, in view of the foregoing, it may not be necessary to discuss the general proposition so broadly advanced by Justices Hawley and Shipman, viz., that every licensee has an implied *prima facie* right to use the name of his patentee to sue every infringer in his district, yet we believe that this doctrine is unsound, and so subversive of constitutional rights, unless it means, simply, that the right to use the name presumptively exists, if not questioned and denied by the patentee, that we must challenge it.

If such a dangerous right exists, it exists nowhere but in patent law, and is violative of every doctrine, both at law and in equity, which has sought to preserve the rights of private prop-

erty, and has declared that no Court has jurisdiction to adjudge any question, unless it has the parties or the subject-matter before it by voluntary appearance, or some involuntary process, which guarantees the right to be heard.

One's name is property, and the right to use thereof may be of great value, and the use thereof can be enjoined; yet the lower Court said that it will, without jurisdiction, both hear and determine all matters wherein the use of our name is necessary.

At law, the assignee of a chose in action, by implied contract, obtained the right to the use of the name of the assignor to enforce his contract rights. In equity, the assignee sued in his own name, but no instance can be found in the books where an assignee could sue in the name of assignor for a tort done to the assignor where, at the time of the transfer, the tort had not been committed. There could be no general assignment of the rights to the use of the assignor's name for wrongs to be done in the future.

Kendall vs. U. S., 7 Wall., 116.

The books cite many cases between licensor and licensee where the licensor has broken his covenant to protect the licensee, but they have been suits for damages for breach of contract. This is a plain, adequate and speedy remedy, and the damage done to the licensee can be readily ascertained.

But, say the California Electric Light Company, damages will not compensate. Now, why? It is only a licensee, and has no interest in our patent rights; if it sues at law, it is only interested in damages; if in equity, it is only concerned with the profits recovered. A license only results from contract, and if the covenants be violated, an action at law lies to redress the wrong resulting from the breach of contract.

Root vs. Railway Company, 105 U. S., 207.

And if the licensor is not in this State, that affords no reason why a Court of Equity can proceed to consider the moral conditions outside of this contract, when it is without jurisdiction to proceed against us, under the rules of law and equity. The rights which a licensee obtains under a license are only those which his contract gives him, and the rules of interpretation thereof are those of the State in reference to which the contract is made.

Hartell vs. Tilghman, 99 U. S., 552.

Wilson vs. Sandford, 10 How., 99.

Liverpool and Great W. S. Co. vs. Phœnix Ins. Company,
129 U. S., 397.

There is nothing in the Federal Statutes or in the Federal decisions which establishes a different canon of interpretation of contracts of license from the ordinary and elemental doctrines applicable to other contracts.

99 U. S., 552, and 10 How., 99, *supra*.

This contract, Exhibit F, of Roe's affidavit, says nothing about the licensor, the Telegraph Supply Company, bringing suits to protect its licensee, Kerr, from infringements of third parties. And if the parties to the contract, in the exercise of their discretion, have not chosen to embody therein some covenant requiring the patentee to protect his agent, the Court cannot add new terms to the contract between the parties, and imply something which the parties, for sufficient and weighty reasons, may have designedly omitted.

McKay vs. Smith, 39 Fed. R., 556.

Nat. Rubber Co. vs. Boston Co., 41 Fed. R., 48.

DeWitt vs. Berry, 134 U. S., 306.

Baker vs. Mason, 3 R. I., 45.

And although there is neither an implied nor an express covenant to prosecute infringers in the contract, and although if suit were brought by the California Electric Light Company against the Brush Electric Company for breach of contract, in not giving it immunity from these tort feasons, judgment must be for the defendant, because of the want of such a condition, yet it is claimed that all this amounts to nothing, as the California Electric Light Company has, by some invisible and unrecognizable virtue, secreted in this contract the inherent power of rendering vain the principle of law that no such covenant to protect against infringers can be implied; for by the unwilling use of our name we are forced to do what the law says we are not bound to do.

To support this view some few, but not well considered, opinions of the Circuit Court have been cited, but on examination we find the facts are different from the case at bar, and be-

sides they don't seem to have been discussed with any elaboration.

The first case is that of *Goodyear vs. McBarney*, 3 Blatch. This case does not sustain the contention of the learned judge below, for the suit was brought in the name of Goodyear, and the defendant set up a release by plea, and the Court only held that it was proper to allow the plaintiff to traverse the plea of defendant.

Goodyear vs. Bishop, 4 Blatch., 438; 2 Fish., 96.

Goodyear had stipulated in his contract with his licensee, the Union India Rubber Company, to sue all infringers. The *defendant* moved to discontinue the suit, but the Court refused because this stipulation gave the right to the use of the patentees' name.

In *Wilson vs. Chickering*, 14 Fed. R., 917, the question was not involved nor discussed. The only points being, was plaintiff a licensee or assignee, and if a licensee, could he sue in his own name, the remarks of the learned judge were mere *dicta*, and not within the purview of the contest between the parties, and it is well settled that mere volunteer remarks of a Court are without authority.

The Brush-Swan case, in 48 Fed. R., we have already discussed.

In these cases there was no question raised or discussed as to the right or power of a Court to assume jurisdiction arbitrarily, and to pass on the rights of parties not before it. In none of these cases except the Brush-Swan case was the motion by the plaintiff whose name was used; and in the Swan-Brush case, the learned Judge, recognizing the dilemma of want of jurisdiction, said he had it, because the owner of the Brush Company was before him; but even this shadowy support is absent in the case at bar. The Court has no jurisdiction of the Brush Electric Company under any contract made by it, nor by virtue of having any one before the Court who is either in part or in whole its owner and master.

But, say our learned opponents, the Brush Electric Company, the licensor, is beyond the reach of any process of this Court, and it cannot be made a party defendant, under the statute of 1888, supplement to Revised Statutes, Vol. I, page 611, and explained in *U. S. vs. S. Pac. R. Co.*, 49 Fed. R., 297, and *McCormick vs. Walthers*, 134 U. S., 43.

But to say that they can make it a co-plaintiff, and thus circumvent the Statute, is to accomplish indirectly what the law says cannot be done directly; besides, this procedure is in the teeth of the Constitution, which says that we can not be deprived of our rights except by due process of law.

R. R. Tax cases, 8 Sawy., 289.

There can be no analogy between the case at bar and the case of an assignment of a chose in action, for in the case of the assignment of a contract no interest whatever is left in the assignor, and he cannot be injured, but the very definition of a license shows that we own still the monopoly and control the patent.

2 Rob. on Patents, Sec. 757.

In addition to the foregoing there is another proposition which is equally conclusive against the position attempted to be maintained by the California Electric Light Company and appellees.

The Telegraph Supply Company was incorporated in 1875 solely for manufacturing telegraph supplies, annunciators, burglar fire and other alarm signals (Transcript, p. 80).

In March 24, 1877, Brush, the inventor of the patent in suit, made this Company his licensee without the power of assignment, to sell and manufacture certain improvements in dynamo electrical apparatus (Transcript, pp. 124-134).

July 28, 1880, the name of the Telegraph Supply Company was changed to the Brush Electric Company (Transcript, p. 81).

The patent in suit No. 219,208 was not issued to Brush until September 21, 1879 (Transcript, pp. 126-136).

July 27, 1886, Brush assigned his patent to the Brush Company (Transcript, pp. 123, 128, 133, 138).

At the time of the contract of August 2, 1879, not only had the patent No. 219,208 not been issued, but the Telegraph Supply Company had no right or power to make Kerr a licensee of this patent (Transcript, pp. 122, 132).

This seems conclusive that the only purpose of the contract of August 2, 1879, was to make Kerr not a licensee, but simply an agent for this Coast of the Telegraph Supply Company.

The Civil Code of Cal., Secs. 1647 and 1648, says that a contract is to be explained by reference to the circumstances under which it was made and the matter to which it relates,

however broad may be its terms. This canon of interpretation is as old as the law itself.

Rock Island Railway vs. R. G. R. R., 143 U. S., 596.

If the contract was a mere agency, there being no covenant therein prohibiting the Brush Company, or its predecessor, from itself selling on this coast, it would have an absolute right so to do.

Golden Gate Packing Co. vs. Farmers' Union, 55 Cal., 606.

And if the Brush Company had the right to sell here, it is obvious that the California Electric Light Company would not have the right, because of its mere agency either to use our name to sue others, or even to sue us for a breach, as we would not come within the rule of *Littlefield vs. Perry*, 21 Wal.

But further, the contract of August 2, 1879, neither makes Kerr and his successor, the California Electric Light Company, the licensee, nor the agent of the Telegraph Supply Company and its successor the Brush Electric Company. This contract is only executory, not executed; it is only an agreement that Kerr may become the agent or licensee, and before it can operate to create either relation there must be a judicial decree in appropriate proceedings, or the Brush Company must make a new appointment.

The language (Transcript, p. 77) is : " The party of the first part does give and grant unto the party of the second part the right to use and sell all inventions under any patents owned or controlled by party of first part, or which it *may become possessed of.*"

It neither owned nor controlled any dynamo electrical patents at the time, and did not until July, 1886. Prior to that date the Telegraph Supply Company owned only a mere possibility or contingency, but not founded upon any right coupled with any interest in the patent. At the time of the contract of August 2, 1879, between it and Kerr, it had no more right to or interest in the Brush patent in suit, than counsel has to and in some unknown band of sheep of some unknown owner in some unknown country. All the Telegraph Supply Company owned was a mere contingency, and that interest was held in common with the whole world. Nay, more, Brush had not at that time even obtained his patent. By this contract the Telegraph Supply Company undertook to sell to Kerr what it could not.

It matters not that the vendor uses the present tense, for, as was said in *Regan Vapor Engine Co. vs. Pac. Gas Engine Co.*, 49 Fed. R., 48, the words "give and grant" would be sufficient if there was anything to license, or if the Telegraph Supply Company had any right to license.

A sale presupposes the existence of the subject of sale and the ownership by the vendor.

Civil Code, Cal., Sec. 1722.

Otherwise there is no sale, but only an agreement for a sale. Benj. on Sales, Sec. 78, says one can make a valid agreement to sell, but not an actual sale where the subject of the contract is something to be afterwards acquired, as any goods to which he may obtain title within the next six months.

Brooms' Legal Maxims, side p. 500.

2 Kent Com., 468, and N.

Bacon's Abridgment (Tit. Grant D.) says: "A man cannot grant all the wool that shall grow upon his sheep that he shall afterwards buy, for there he hath it not actually or potentially"; and in *Low vs. Pew*, 108 Mass., 347, 11 Am. R., 357, the Court, speaking of an attempted sale of a future catch of fish, says:

"It is an elementary principle of the law of sales that a man cannot grant personal property in which he has no interest or title. To be able to sell property he must have a vested right in it at the time of the sale. It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it within the meaning of this rule. The seller must have a present interest in the property of which the thing sold is the product, growth, or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus, a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest (2 Kent's Com., 10th ed., 468 (641), Note A; *Jones*

“ vs. *Richardson*, 10 Metc., 481 ; *Bellows vs. Wells*, 36 Vt., 599 ;
 “ *Van Hooser vs. Cory*, 34 Barb, 9 ; *Grantham vs. Hawley*, Hob.,
 “ 139). In the case at bar the sellers, at the time of the sale,
 “ had no interest in the thing sold. There was a possibility
 “ that they might catch halibut, but it was a mere possibility
 “ and expectancy, coupled with no interest. We are of the opinion
 “ that they had no actual or potential possession of, or interest
 “ in, the fish, and that the sale to the plaintiffs was void.”

In *Thrall vs. Hill*, 110 Mass., 330, it was again said: “ It is true
 “ that a man cannot sell personal property in which he has no
 “ interest. A mere possibility, coupled with no interest, is not
 “ the subject of sale and would not pass by a bill of sale.”

To the same effect is Newmark on Sales, Sec. 68, and case.
 cited. This doctrine finds support in 2 Rob. on Patents, Sec.
 771, and was approved in *Regan Vapor Eng. Co. vs. Pac. Gas Eng.
 Co.*, 49 Fed. R., 68.

That the incorporeal right of license is a subject of sale is un-
 doubted in the light of the last case, and of—

Brooks vs. Byan, 2 Story, C. C., 525.

Hathaway vs. Bennett, 10 N. Y., 108.

Senter vs. Davis, 38 Cal., 450.

Thus, then, this agreement of August 2, 1879, of itself, con-
 veyed no license to sell and use the inventions under the patent
 in suit, and created no relation of licensee and licensor; at most
 it gave only rights enforceable at law, or equity, but no title; nay,
 more, at the time it was executed the Telegraph Supply Company
 had no right to sub-license, and the facts show conclusively that
 the purpose and intent was only to create a mere exclusive
 agency.

The facts of our selling to the California Electric Light Com-
 pany only made it an implied licensee, and protected it from any
 claim of ours against it for infringement, by the use of the
 Brush inventions, but until it has the legal title to the license,
 it can not even be intimated that it can use our name; the mere
 fact that it was joined with us in another suit as a co-plaintiff
 does not affect us, as it never was a necessary party.

In view of the foregoing, and that we who own the patent

should not be compelled against our will and without process to imperil the life of our valuable patent, we respectfully ask that the order of the lower Court be reversed and we be allowed to withdraw our name from the bill.

Respectfully submitted,

EDWARD P. COLE,

Solicitor for Appellant.